Supreme Court, U.S.
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No. 92-1139

In the Supreme Court of the United States

OCTOBER TERM, 1992

RAY CARLISLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court committed plain error by failing to instruct the jury that in a prosecution for structuring currency transactions for the purpose of avoiding currency reporting requirements in violation of 31 U.S.C. 5324, the government must prove that the defendant knew that structuring for that purpose is illegal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is unpublished, but the judgment is noted at 967 F.2d 592 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1992. A petition for rehearing was denied on August 27, 1992. Pet. App. 8. The petition for a writ of certiorari was filed on November 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of conspiring to defraud the Internal Revenue Service by obstructing its function of investigating currency transactions in amounts over $10,000, to cause domestic financial institutions to fail to file currency transaction reports, and to structure currency transactions, all in violation of 18 U.S.C. 371; and of structuring currency transactions, in violation of 31 U.S.C. 5324(3). Petitioner was sentenced to one year's custody in a halfway house, five years' probation, and a fine of $3,500. The court of appeals affirmed. Pet. App. 1-7.

1. Petitioner participated in a scheme to purchase cashier's checks in amounts of less than $10,000. The cashier's checks were used to make down payments on two houses. Pet. App. 2. Petitioner promised to pay Curtis Randolph $3,000 if he would purchase cashier's checks in amounts of less than $10,000. Gov't C.A. Br. 3-4. Petitioner told Randolph that the purchase of the cashier's checks "needed to be done this way because of the Reporting Act on cash over $10,000." *Id.* at 4, quoting Tr. 246. Randolph purchased six cashier's checks from six different banks, four in the amount of $9,000 and two in the amount of $8,500. Gov't C.A. Br. 3.

2. At trial, the district court gave the following jury instruction on the charge that petitioner had structured currency transactions in violation of 31 U.S.C. 5324(3):[1]

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[1] Section 5324(3) of Title 31 provides in pertinent part:

> First, that a defendant knowingly and willfully structured or assisted in structuring a currency transaction.
>
> Second, that the purpose of the transaction was to evade the reporting requirements of Section 5313(a) of Title 31.
>
> Third, that the transaction involved one or more domestic financial institutions.

Gov't C.A. Br. 9, quoting Tr. 704. The court added:

> In other words, if you find beyond a reasonable doubt that a defendant knowingly and willfully structured or assisted in structuring a currency

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> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> • • • • •
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

By regulation, the Secretary has required banks to file currency transaction reports (CTRs) for any "transaction in currency of more than $10,000." 31 C.F.R. 103.22(a)(1). Under 31 U.S.C. 5322(a), any person who "willfully violat[es]" Section 5324(3), or any regulation prescribed thereunder, is guilty of a criminal offense.

On October 28, 1992, Congress amended 31 U.S.C. 5324. See Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, Tit. XV, § 1525, 106 Stat. 4064. What was formerly 31 U.S.C. 5324(3) was unaffected in substance, but that provision will be recodified as 31 U.S.C. 5324(a)(3). For purposes of simplicity, we refer to the version in effect when the court of appeals issued its decision.

> transaction with one or more domestic financial institutions and that he did so for the purpose of evading the reporting requirements of Section 5313(a), then you should find the defendant not guilty.

Gov't C.A. Br. 10, quoting Tr. 704. Similarly, the court instructed the jury as to the conspiracy charge:

> It would * * * be a violation of law for a person to willfully and knowingly conspire with one or more other persons to structure or assist in the structuring of any transaction with one or more domestic financial institutions for the purpose of evading the CTR reporting requirement.

Gov't C.A. Br. 9, quoting Tr. 700. At petitioner's request, the court gave the following instruction on willfulness:

> An act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids. That is to say, with bad purpose either to disobey or to disregard the law. To constitute the crime charged in the indictment there must be a joint operation of two essential elements, an act forbidden by law and an intent to do the act.

Gov't C.A. Br. 8, quoting Tr. 690.

3. The court of appeals affirmed. Pet. App. 1-7. It rejected petitioner's contention that this Court's decision in *Cheek* v. *United States*, 498 U.S. 192 (1991), required the district court to instruct the jury that "willful" in the context of 31 U.S.C. 5324(3) means "a voluntary, intentional violation of a known legal duty." Pet. App. 4-7. Because petitioner failed

to raise that issue before the district court, the court of appeals applied the plain error standard of review. *Id.* at 4. The court found that the instructions correctly stated the law. Relying on its prior decision in *United States* v. *Hoyland*, 914 F.2d 1125, 1129 (9th Cir. 1990), the court explained that "Congress changed the law to make it a crime so to structure with the intent to prevent reporting. To act willfully under the statute is to act with this intent." Pet. App. 5. The court distinguished *Cheek* as a case arising under the Internal Revenue Code. It explained that, in light of the complexity of the tax laws, the Court held in *Cheek* that " 'willfulness" for certain criminal tax offenses requires a "voluntary and intentional violation of a known legal duty." *Id.* at 6, citing *Cheek*, 498 U.S. at 196.[2]

DISCUSSION

Petitioner contends that the district court committed plain error by failing to instruct the jury that in order to prove a "willful[] violat[ion]" (31 U.S.C. 5322(a)) of the anti-structuring provisions of 31 U.S.C. 5324(3), the government must establish that the defendant knew that it was unlawful to structure currency transactions for the purpose of avoiding federal reporting requirements. We believe that the court of appeals properly rejected petitioners' contention. But there is a conflict among the circuits on the underlying question presented, and the govern-

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[2] The court of appeals also rejected petitioner's challenge to the district court's failure to excuse certain jurors for cause. Pet. App. 2-4. Petitioner does not pursue that argument in this Court.

ment recently acquiesced in a petition for certiorari presenting that question. See *Ratzlaf* v. *United States*, No. 92-1196. Accordingly, the Court may wish to hold the petition in this case pending its disposition of the petition in *Ratzlaf*.[3]

We note that this case differs from *Ratzlaf* in one important respect. Petitioner, unlike the petitioner in *Ratzlaf*, failed to object to the jury instructions in the district court. See Pet. App. 4. Accordingly, the jury instructions are subject to review only for plain error. See Fed. R. Crim. P. 52(b). The plain error rule may be invoked only "to correct only 'particularly egregious errors,' those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Young*, 470 U.S. 1, 15 (1985) (citations omitted). See also *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982) (plain error rule "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result"); *United States* v. *Beaumont*, 972 F.2d 91, 93-95 5th Cir. (1992) (not plain error to fail to instruct jury that government was required to prove that the defendant knew that structuring transactions for the purpose of evading currency reporting requirements is illegal).

Indeed, petitioner not only failed to object to the jury instructions in the district court, he specifically requested the instruction on willfulness that he now attacks. See Gov't C.A. Br. 8, quoting Tr. 690. Absent the most exceptional circumstances, a defendant cannot win reversal based on a trial error that he

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[3] We have provided a copy of our brief in *Ratzlaf* to counsel for petitioner.

invited. See, *e.g.*, *United States* v. *Angiulo*, 897 F.2d 1169, 1216 (1st Cir.), cert. denied, 111 S. Ct. 130 (1990); *United States* v. *Muskovsky*, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989). Consequently, even if the Court were to grant the petition for a writ of certiorari in *Ratzlaf* and reverse the judgment of the court of appeals in that case, we doubt that petitioner would be entitled to any relief. Nonetheless, the plain error question may be affected by this Court's disposition of the *Ratzlaf* case. We therefore do not oppose the Court's holding this case pending the Court's decision whether to grant review in *Ratzlaf* and the ultimate disposition of that case.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Ratzlaf* v. *United States*, No. 92-1196, and then disposed of in light of the decision in that case.

Respectfully submitted.

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